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Nos. 94-7448, 94-7492

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IN THE

Supreme Court of the United States

October Term, 1994

ROLAND J. BAILEY (No. 94-7448),
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

CANDISHA S. ROBINSON (No. 94-7492),
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICUS CURIAE* OF JAMES DOE IN SUPPORT OF PETITIONERS

EDWARD H. SISSON
Counsel of Record
DANIEL A. REZNECK
Arnold & Porter
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5495
Counsel for *Amicus Curiae*

CASILLAS PRESS, INC., 1717 K STREET, N.W., WASHINGTON, D.C. 20036

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INTEREST OF JAMES DOE

Amicus Curiae James Doe, a government witness recognized by the United States for his substantial assistance in the fight against prison drug dealing, was a college-educated, gainfully employed veteran in his early thirties with a minimal prior record (1 misdemeanor) at the time of his arrest in the fall of 1990 during a police raid on a friend's house in the District of Columbia. The search warrant authorizing the raid was based on a sale of drugs to an undercover officer by someone other than Mr. Doe, and not on any prior criminal conduct by Mr. Doe.

The house was not a "crack house" or a "fortress" but a private residence. In fact, the front door was unlocked when the police arrived. None of the defendants resisted the entry of the police or the arrests.

All defendants, including Mr. Doe, were charged with crimes, including possession with intent to distribute at least 50 grams of "crack" in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A), and of violating 18 U.S.C. § 924(c)(1) by using or carrying a handgun during and in relation to that crime. There was no charge that the house was a "crack house" maintained in violation of 21 U.S.C. § 856(a), nor was any conspiracy charged.

Unlike the other defendants arrested along with Mr. Doe -- who were kept in custody from the moment of their arrests -- Mr. Doe was deemed not to be a flight risk and was placed on supervised work release. Mr. Doe merited

the government's trust and never missed any required appearance.

With respect to the charge under Section 924(c), which forms the basis of Mr. Doe's interest in the present action, it is important to note the almost nonexistent connection between the gun and Mr. Doe.

Although Mr. Doe was arrested in an upstairs bedroom in which he sometimes stayed (sharing it with another), the gun for which Mr. Doe was eventually sentenced for "using" was found in a downstairs front hall closet close to the place where the remaining defendants were arrested. One defendant -- not Mr. Doe -- admitted to purchasing the gun for personal protection following the shooting death of a relative near the house shortly before the arrest.

There was no direct evidence that Mr. Doe even knew of the gun's existence or location. For example, the gun was not contained in any article of Mr. Doe's clothing, nor in any bag or container owned, controlled or used by Mr. Doe. Only the facts that Mr. Doe lived part-time at the house, happened to be in the house at the time of the raid, and was named on the lease along with the primary resident, a friend and codefendant, could be said to connect Mr. Doe to the gun.

Lacking hard evidence of Mr. Doe's actual knowledge of or control over the gun, the prosecutor presented a police expert, who testified in response to a hypothetical question supposedly incorporating the facts of the case that the gun was available to all who lived in the house. Those hypothetical facts omitted, however, any

evidence that Mr. Doe actually knew of the gun or its location. Nevertheless, the jury convicted Mr. Doe.

Sentencing of Mr. Doe, however, was postponed for several years, during which time Mr. Doe served as an undercover agent and government witness, providing substantial assistance to law enforcement authorities. This assistance included exposing a jail guard's criminal activities and breaking up a prison drug ring, all at substantial risk to Mr. Doe's life and safety.

The United States Department of Justice valued Mr. Doe's assistance so greatly that it moved the sentencing judge to impose a sentence "below that prescribed by either the United States Sentencing Guidelines or the applicable mandatory minimum sentencing provisions of 21 U.S.C. § 841(B)(1)(A)(iii) and 18 U.S.C. § 924(c)." The court honored the government's request and imposed a 60-month sentence on each conviction to run concurrently, with credit for time served since the date of arrest.

The court also sealed all memoranda and motions related to the sentencing, as well as the case itself and the notice of appeal to the United States Court of Appeals for the District of Columbia Circuit, to prevent any disclosure to persons who might seek revenge against Mr. Doe as a result of Mr. Doe's law enforcement efforts. Mr. Doe's appeal is also sealed and his name is kept confidential. *See In re: Sealed Case*, D.C. Cir. No. 94-3009.

At the time of Mr. Doe's sentencing and of the filing of his notice of appeal, the District of Columbia Circuit had vacated its decision in *United States v. Bailey*, 995 F.2d

1113 (D.C. Cir.), *vacated, reh'g en banc ordered*, 4 F.3d 1004 (1993) and was considering that case *en banc*. Accordingly, by consent, the court stayed the briefing of Mr. Doe's appeal pending resolution of the *en banc* proceedings and any subsequent proceedings on writ of certiorari in this Court. Beyond question, Mr. Doe has a powerful interest in the outcome of this case.

SUMMARY OF ARGUMENT

What "use" of a firearm "during and in relation to" the act of cocaine possession sparks the special concern of Congress? The answer is, the same use that outrages the average citizen watching the seven o'clock news: the blatant, swaggering and reckless brandishing, threatening, and shooting of firearms that result in bodies in the street, children scurrying from playgrounds in fear, and peaceful residents of drug-infested neighborhoods cowering from their windows. Congress drafted 18 U.S.C. § 924(c) to deter *this* kind of outrageous conduct -- not mere constructive possession of or access to a weapon plus a prosecution expert's theory that such use may occur in the future.

Section 924(c) permits the federal government to jail a defendant only if that defendant "uses or carries" a firearm "during and in relation to" that defendant's commission of a crime of violence or drug trafficking. Necessarily, the statute does not apply to one, such as *amicus*, who is not proven even to have known of the existence or location of the firearm, or to one, such as *amicus*, who is

not proven to have dominion or control over the firearm. Beyond this, however, the plain meaning and the legislative history of the operative statutory words "uses" and "in relation to," understood in the context in which Congress chose those terms, require active employment of the firearm to accomplish the crime of violence or drug trafficking. Section 924(c) does not penalize a defendant for *thinking* about using a firearm -- it penalizes use.

Official statements by relevant Congressional committees and by individual Members and Senators confirm Congress' intent that Section 924(c) strikes only at active, immediate employment of firearms to facilitate drug dealing.

Here, the predicate offense is possession of cocaine with intent to distribute -- a continuing offense. If the facts otherwise prove guilt, a man can be convicted of this crime even though he be asleep when the police seize him. But it strains belief to think that Congress intended that a sleeping dealer be sent to jail for an additional five years because he "used" a gun to protect his drugs while he was sleeping, merely because there was a gun somewhere near the drugs. The mere fact that a firearm may be in the same automobile, the same room, or the same dwelling as the defendant or the defendant's drugs is simply insufficient to convict under Section 924(c).

To the extent that there is any ambiguity in the text of Section 924(c), the rule of lenity, and due process considerations of fair notice, require that the statute be construed to penalize only that conduct that the statute clearly outlaws -- active, immediate employment of a firearm. It is

unfair to jail anyone for five years based on a strained, expansive interpretation of a statute that does not, by its own words, give a layman fair notice of the conduct that will subject him to such a heavy penalty. Judicial respect for the authority of the legislative branch requires narrow construction of Section 924(c).

Finally, Section 924(c) must be construed to avoid any constitutional question concerning Congress' power to penalize the conduct in issue. The federal government has no general police power, and authority for every Congressional act must be expressed in one of the Constitution's enumerated federal powers.

Here, where the predicate offense relates to cocaine trafficking, Congress' power to regulate may be found only in the Commerce Clause. But in the context of the present cases, where interstate commerce itself is not the direct target of federal attention, the scope of federal action is limited to only that conduct that "substantially affects" interstate commerce. Section 924(c) lacks any requirement that the guns whose use is penalized have themselves moved in or otherwise substantially affected interstate commerce. Section 924(c) thus may constitutionally reach only that "use" of a gun "in relation to" drug trafficking that has a "substantial effect" on that drug trafficking. On the facts presented by petitioners and by *amicus*, the guns' effect on cocaine commerce is nonexistent.

Were the District of Columbia Circuit's interpretation of Section 924(c) correct, the statute as applied here would suffer from the same infirmity as that which

caused this Court to find the Gun-Free School Zones Act of 1990 unconstitutional: the conduct penalized (as opposed to future conduct, however likely to occur) simply has no effect on any commercial activity within the reach of federal power, and intrudes instead into the traditional realm of state regulation. *United States v. Lopez*, 514 U.S. ___, 115 S. Ct. 1624 (1995). Here, petitioners and *amicus* have been punished merely for passively possessing a firearm, on a theory that they "used" the firearm by possibly thinking about using it in the future.

Even if all such similar passive gun possessions nationwide are considered in aggregate for purposes of assessing the constitutionality of applying Section 924(c) to the present cases, it is that passive conduct (*lack* of conduct, to be more precise), and that conduct only, that may be aggregated. Thus, it must be presumed that every gun remains hidden and is not used to threaten, intimidate, or shoot. Even in aggregate, the effect of such passive gun possessions on interstate cocaine commerce simply is not sufficiently substantial to render those possessions subject to federal power. Regulation of such conduct is properly reserved to the traditional repository of the general police power in our federal system, the several States of the United States, or to their people, under the Tenth Amendment to the Constitution.

The potential or probable *future* use that may have been made of the guns in the instant cases, had petitioners and *amicus* not been arrested when they were, is irrelevant to

the construction of Section 924(c). Section 924(c) does not penalize potential future actions or intentions of any kind, and this Court's decision in *Lopez* teaches that the constitutionality of applying a statute to penalize one kind of conduct cannot be determined by reference to *different* potential or probable future conduct that might have been penalized by that or another statute, had that conduct occurred. These defendants cannot be jailed for acts these defendants did *not* commit.

ARGUMENT

I. Section 924(c) Penalizes Only Active and Immediate Employment of a Firearm

The error of the District of Columbia Circuit's *in banc* decision in *United States v. Bailey*, 36 F.3d 106 (D.C. Cir. 1994), *cert. granted*, ___ U.S. ___, 115 S. Ct. 1689 (1995), Joint Appendix ("J.A.") 78, stems from the circuit court's fundamentally flawed approach to the interpretation of 18 U.S.C. § 924(c) (1988). The circuit court's approach is to look first at the substantive drug possession necessary to prove the predicate offense, and only then to examine whether a firearm was "used" in some articulable manner "in relation" to that drug possession. The court thus interprets the terms "use" and "in relation to" as if the drafters of the legislation already had drug possession offenses in mind when selecting the key terms in issue in this case.

But the circuit court has it exactly backward. When Congress selected the terms "use" and "in relation to," it did not have nonviolent drug trafficking crimes such as possession in mind, but only violent crimes.

It is a "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v. United States*, 508 U.S. ___, ___, 113 S. Ct. 1993, 1996 (1993). Thus, while words may have many meanings as defined in the dictionary, "all but one of the meanings is ordinarily eliminated by context." *Id.*

In the context in which Congress chose the terms "use" and "in relation to," there can be only one meaning: the active employment of a firearm in a violent or threatening manner to substantially assist in the commission of a crime.

Amicus will not take up this Court's time repeating in detail the arguments that petitioners will make in support of this conclusion; but a few points are in order.

Congress first included the term "used, or intended to be used" in the original version of Section 924(c). *See* The Omnibus Crime and Safe Streets Act of 1968, Pub. L. No. 90-351, Title IV, § 902, 82 Stat. 233 (June 19, 1968). Congress later amended Section 924 by enacting the Gun Control Act of 1968, Pub. L. No. 90-618, Title I, § 102, 82 Stat. 1224 (Oct. 22, 1968). This Act provided, in pertinent part, for mandatory imprisonment of anyone who "uses a firearm to commit" a federal felony, or who carries a firearm "during the commission of" a federal felony. *Id.* This Act *deleted* the

term "intended to be used" that had appeared in the earlier version, thus clearly indicating that actual, immediate use -- not mere potential future use -- was the conduct to be penalized.

The House passed the Gun Control Act on July 24, the Senate on Sept. 18, and the conference report passed in each house on October 10 and 9 respectively. *See* 1968 U.S.C.C.A.N. 4410.

Throughout the debate over the Gun Control Act, and at the time of its passage, concaine possession for personal use was not a federal crime, while possession for other uses was federally punished merely as a *misdemeanor* on first offense. *See* The Drug Abuse Control Amendments of 1965, Pub. L. No. 89-74 §§ 3, 5, 7, 79 Stat. 229, 232, 233 (July 15, 1965); S. Rep. No. 337, 89th Cong. 1st Sess., *reprinted in* 1965 U.S.C.C.A.N. 1899-1900, 1905, 1906. Possession with intent to distribute only became a distinct felony offense *after* enactment of the Gun Control Act. *See* Amendments to the Federal Food, Drug and Cosmetic Act, Pub. L. No. 90-639, §§ 2,3, 82 Stat. 1361 (Oct. 24, 1968); S. Rep. No. 1609, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 4597, 4600-01, 4603.

Even after this date, however, "use" of a firearm as in petitioners' and *amicus'* cases would not have met the statutory test, because petitioners and *amicus* did not use any firearm in any manner that could be said "to commit" the possession of drugs. Under the Gun Control Act, petitioners and *amicus* did not "use" any firearm at all.

Subsequently, Congress amended the Gun Control Act and adopted the "in relation to" term, expressly limiting Section 924(c)'s penalty for firearm use to uses in relation to "crime[s] of violence." *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Title II, Chapter X, Part D, § 1005, 98 Stat. 2138-39; S. Rep. No. 225, 98th Cong., 2d Sess. 312-14, *reprinted in* 1984 U.S.C.C.A.N. 3490-92. Again, the "use" term of the statute only penalized the active, immediate employment of a firearm. Conduct such as that of petitioners and *amicus*, being wholly nonviolent, remained wholly outside the statute.

Thus there can be no question that prior to the enactment of the Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104(a)(2), 100 Stat. 449, 456-57 (1986) ("1986 Amendment"), which added drug trafficking to the list of predicate offenses under the Gun Control Act, use of a firearm such as occurred here was not penalized by Section 924(c). But this Court need not take *amicus'* word for this conclusion. This Court may rely on the Solicitor General himself -- who, before the 1986 Amendment, argued precisely *amicus'* position in briefing to this Court in *McLaughlin v. United States*, 476 U.S. 16 (1986). *See Bailey*, 36 F.3d at 123-24, J.A. 114 (Williams, J., dissenting, quoting from page 19 & n.18 of the Solicitor General's brief in *McLaughlin*, Docket No. 85-5189). *Amicus* respectfully suggests that the Court ask the Solicitor General, at oral argument in this case, to confirm that he stands behind his *McLaughlin* brief and agrees that prior to the 1986 Amendment, the terms "use" and "in relation to" required active employment of a firearm.

Thus, if there is any basis to the argument that Congress intended these terms to encompass all conceivable conduct that arguably might be a "use" relating to drug possession with intent to distribute, the evidence must be found in the 1986 Amendment itself or in its legislative history. But those sources are barren of any nourishment for the circuit court's position.

Neither the text of the 1986 Amendment nor any scrap of its legislative history give the slightest indication that Congress intended to modify the terms "use" or "in relation to" to accommodate all the theoretical uses or hypothetical relationships that might be proposed as prosecutors began to apply Section 924(c) to drug possession offenses. Indeed, the 1986 Amendment defined "drug trafficking crime" as including "distribution, manufacture, or importation" but did not even mention possession with intent to distribute, *see* 1986 Amendment, 100 Stat. 457. Congress was well aware of the difference between distribution and possession with intent to distribute. *See* Drug Abuse Control Amendments of 1965, 79 Stat. 229, 232 (treating distribution and possession separately); Amendments to the Federal Food, Drug and Cosmetic Act, 82 Stat. 1361 (treating possession for distribution and other possession separately). If Congress had wanted to penalize passive firearm possession during a possession of drugs with intent to distribute, Congress certainly knew how to do so. Congress did not do so.

Obviously, Congress merely intended to add to the list of federal crimes that could serve as predicate offenses, without implicitly redefining the term "use" to encompass new

theories of "use" that might be proposed to make Section 924(c) applicable in any drug possession case where a gun happens to turn up in the evidence. *See, e.g.*, H.R. Rep. No. 495, 99th Cong., 2d Sess. 15, 17-18, 27, *reprinted in* 1986 U.S.C.C.A.N. 1327, 1341, 1343-44, 1353; 132 Cong. Rec. 6850, 6856, 6857 & 7081 (1986) (statements of Reps. Moore, Wirth & Gallo); 132 Cong. Rec. 9592, 9603 (1986) (statements of Sens. Hatch & McClure).

Even the circuit court admits that the legislative history merely shows that Congress "avoided any implication that it intended to narrow the relationship" between the firearm and the predicate offense, *see Bailey*, 36 F.3d at 116, J.A. 97-98. This begs the question of how broad that relationship was prior to the 1986 Amendment, and the circuit court makes no effort to show that the intended definitions of these key terms were as broad before the 1986 Amendment as the court asserts they were after that amendment. As stated above, the meaning of these key terms prior to the 1986 Amendment required active employment of a firearm.

The circuit court, rather than addressing the context in which Section 924(c) was enacted and amended, clings to an ancient case, tangentially noted by this Court in *Smith v. United States*, ___ U.S. ___, 113 S. Ct. 2050, 2054 (1993), involving a statute enacted by a Congress that adjourned 80 years prior to convening of the Congress that enacted Section 924(c). *See Bailey*, 36 F.3d at 114, J.A. 94, *citing Astor v. Merritt*, 111 U.S. 202 (1884). *Astor* concerned a customs statute and whether a man must wear a shirt in

order to avoid paying duty on it, and the context is obviously wholly different from the relevant context here.

The circuit court's heavy reliance on *Astor* flouts the rule in *Deal* because it takes a situation in which the context of the word "use" permits an expansive interpretation and applies it to a different situation in which the context excludes that interpretation. The circuit court's action was arbitrary. It could as easily have chosen to rely on a case in which the context ruled out all but a narrow interpretation of the terms in issue. *See, e.g., Public Citizen v. Department of Justice*, 491 U.S. 440 (1989) ("utilize," as used in the Federal Advisory Committee Act, interpreted narrowly). Indeed, as *amicus* shows below, *Public Citizen* would have been a better choice because in that case this Court interpreted the usage term narrowly to avoid a constitutional question, a situation similar to that presented here.

The circuit court's approach is, at bottom, mere result-oriented jurisprudence in which doctrines and precedents are selectively chosen or discarded in order to use Section 924(c) to strike at the drug trade. But Section 924(c) penalizes violence, and while violence is often associated with drug trafficking, drug possession with intent to distribute is not of itself violent. Accordingly, "use" of a gun in the ordinary sense of the word -- active employment as a weapon -- may occur very seldom, if ever, during those periods where mere possession is the only drug trafficking crime being committed.

Many drug possession fact-patterns simply do not involve any violence or threats. Thus, in order to stretch the statute to cover the conduct in issue, the circuit court is reduced to arguing, in substance, that Congress *sub silentio* reinterpreted the words "use" and "in relation to" when it added drug trafficking offenses to the list of predicate offenses under Section 924(c), such that merely knowing about a gun's proximity to contraband is now to be called "use" "in relation to" the possession offense. To the contrary, the government's theory of "use" as "emboldening" finds no support in the statute.

Merely thinking about using something is not "use" of it as Congress intended in Section 924(c). Given the complete lack of support for the government's position in the statute or in the legislative history, the circuit court's ruling was reversible error.

II. Lenity and Fair Notice Require That Section 924(c) Be Interpreted To Penalize Only Active and Immediate Employment of a Firearm

The rule of lenity is one of the most significant canons of construction of the criminal statutes. This Court articulated the rule in *United States v. Bass*, 404 U.S. 336 (1971), stating that "where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." *Id.* at 348. The twofold rationale for the rule is, first, to avoid judicial intrusion upon Congress' duty to determine criminal penalties, and second, to provide fair notice regarding the

penal consequences of prohibited conduct. *Id.* As this Court explained over a century and a half ago,

> The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.
>
> . . . .
>
> . . . It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated.

United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95-96 (1820).

This Court has reaffirmed the rule of lenity on many occasions. *See, e.g., United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952) (Congress must speak in "clear and definite" language before the judiciary may choose the harsher of two alternative readings of a statute); *Bifulco v. United States*, 447 U.S. 381, 387 (1980) ("this principle of statutory construction applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose").

This Court stated in *Moskal v. United States*, 498 U.S. 103 (1990), that the rule of lenity applies when "reasonable doubt" persists about the scope of a statute after the examining court has looked to the language and structure of the statute, the legislative history, and the motivating policy concerns of the statute. *Id.* at 108. Here, if the question presented is not already clearly answered in favor of petitioners and *amicus*, then it is certainly an issue that is unclear and debatable -- precisely a situation where the rule of lenity applies. *See Smith v. United States*, ___ U.S. ___, ___, 113 S. Ct. 2050, 2063 (Scalia, J., dissenting).

This Court has previously found Section 924(c) to require application of the rule of lenity, in deciding whether Congress meant Section 924(c) to apply where the predicate offense itself included sentence enhancement for use of a firearm. *See Simpson v. United States*, 435 U.S. 6, 14-15 (1978); *Busic v. United States*, 446 U.S. 398, 406-07 (1980). The Court properly deferred to Congress, which responded by clarifying its intent and thereby giving proper notice to the public of the penal consequences of the prohibited conduct. *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2138 (1984); S. Rep. No. 225, 98th Cong., 2d Sess. 312-13, *reprinted in* 1984 U.S.C.C.A.N. 3490-91. Application of lenity here would similarly offer Congress the opportunity to consider and clarify its intent.

While this Court has once declined to invoke the rule of lenity regarding Section 924(c), on grounds that the statute unambiguously penalized the conduct there in issue (bartering a gun for drugs), *see Smith*, 113 S. Ct. at 2059-60

(1993), the Court's decision there addressed a completely different question than that presented here. The *Smith* case would be applicable here only if the government had prosecuted petitioners and *amicus* on the theory that they had "used" the guns in question because they could potentially have sold the guns along with drugs at some future time. The government has never offered such a theory as justification for imprisoning petitioners or *amicus*.

Several Circuits have applied the rule of lenity in construing Section 924(c). In *United States v. Lindsay*, 985 F.2d 666 (2d Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 103 (1993), the court faced the issue of whether a criminal who used multiple firearms in a single drug trafficking crime could be charged with multiple violations of Section 924(c). The court, by applying the rule of lenity, held that when the government linked multiple firearms to a single crime, only one Section 924(c) violation occurs. *Id.* at 674. The Fifth, Sixth, Tenth and Eleventh Circuits have reached the same conclusion on this issue. *See United States v. Privette*, 947 F.2d 1259 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1279 (1992); *United States v. Henry*, 878 F.2d 937 (6th Cir. 1989); *United States v. Moore*, 958 F.2d 310 (10th Cir. 1992); *United States v. Hamilton*, 953 F.2d 1344 (11th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 204 (1992). In *United States v. Jones*, 986 F.2d 42 (3d Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 3015 (1993), the court, by applying the rule of lenity, found that under Section 924(c), when a subsequent sentence for a drug offense is imposed by a court other than the court that

imposed the original sentence, the subsequent sentence can run concurrently and not consecutively. *Id.* at 43-44.

As noted above, the government now takes the opposite tack to that it pressed on this Court in briefing in *McLaughlin*, where the government asserted the position it now opposes. *See Bailey*, 36 F.3d at 123-24, J.A. 114 (Williams, J., dissenting). Regardless of whether the government may be entitled to change its mind, it cannot assert that its former position was unreasonable. Thus, the government cannot reasonably maintain that Section 924(c)'s "use" requirement is clear and unambiguous. Where a criminal statute is ambiguous, the rule of lenity applies, and the statutory ambiguity "should be resolved in favor of the narrow construction." *Bailey*, 36 F.3d at 124, J.A. 115 (Williams, J., dissenting). Narrowly construed, Section 924(c) does not penalize the conduct of petitioners and *amicus*. Their convictions must be reversed.

III. As Applied Here, Section 924(c) Must Be Construed To Penalize Only Uses of a Firearm That Substantially Affect Interstate Commerce, To Avoid Decision of a Significant Constitutional Question

A. The Circuit Court's Construction of Section 924(c) Unconstitutionally Exceeds Federal Power and Improperly Infringes on State Authority

Section 924(c) is not a statute whose constitutionality may be grounded solely on the constitutionality of a given conviction for the predicate offense. "[Section] 924(c) creates an offense distinct from the underlying federal felony." *Simpson*, 435 U.S. at 10. Accordingly, the constitutionality of applying Section 924(c) to petitioners and *amicus* is not answered by pointing solely to the constitutionality of convicting petitioners and *amicus* of the predicate drug trafficking offenses. Section 924(c) must stand on its own. *See, e.g., United States v. Hill*, 971 F.2d 1461, 1464 (10th Cir. 1992) ("a conviction and sentence under § 924(c) requires the full panoply of constitutional safeguards ordinarily granted criminal defendants"); *United States v. Nelson*, 27 F.3d 199, 200 (6th Cir. 1994) (same).

In certain rare cases, where a defendant is not charged with violating the predicate offense, or is charged but is acquitted, Section 924(c) may be employed to punish not merely the use of a firearm, but the underlying conduct supporting conviction for the predicate offense as well. *See,*

e.g., United States v. Laing, 889 F.2d 281, 288-89 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1069 (1990). In such a case, it may be that the constitutionality of applying the statute may depend solely on federal authority to penalize that underlying conduct, without regard to whether the use of the firearm substantially affected that conduct.

But the government here did not rely on Section 924(c) alone to punish petitioners and *amicus*. In the great majority of cases, such as those of petitioners and *amicus*, the defendant *is* charged and convicted of the underlying offense. In such cases, *Simpson*, 435 U.S. at 15, and *Busic*, 446 U.S. at 406-07, as well as Double Jeopardy concerns, *require* this Court to find that Congress intended Section 924(c) to punish *only* the additional "use" of the firearm, *not* the underlying offense itself. Both *Simpson* and *Busic* hold that Section 924(c) cannot be interpreted to punish conduct already penalized by a separate conviction for committing the underlying offense, absent clear direction from Congress. *Cf. United States v. Young*, 936 F.2d 1050, 1056 (9th Cir. 1991) (permitting enhanced punishment of firearm use under both Section 924(c) and 18 U.S.C. § 922(g) *only* because Congress expressly provided, in the Comprehensive Crime Control Act of 1984 following *Simpson* and *Busic*, that firearm use may be doubly punished). Notably, Congress has never said that the underlying conduct itself, other than firearm use, may be doubly punished under both Section 924(c) and the predicate statute.

Thus, where a defendant has been convicted of the predicate offense, Section 924(c) may be applied *only* as a penalty for the "use" of a firearm "in relation to" the underlying offense and not for the underlying offense itself. In this situation, the constitutionality of applying the statute must be assessed by reference *only* to the conduct that gives rise to the penalty, *exclusive* of the conduct that was an element of the underlying offense.

The legislative history of Section 924(c) relating to the statute's constitutional basis, although scant, supports *amicus'* position. The constitutional authority undergirding Section 924(c) was the Commerce Clause. *See United States v. Melville*, 309 F. Supp. 774, 776-78 (S.D.N.Y. 1970), (discussing the legislative history of the Gun Control Act). By limiting the application of his proposed amendment to the Gun Control Act to federal felonies, Rep. Poff, the sponsor of the amendment, hoped to avoid the policy questions attendant on converting state crimes into federal offenses and to relieve federal prosecutors of "the evidentiary burden of proving that the firearm moved in interstate commerce in order to establish Federal jurisdiction in each individual case." 114 Cong. Rec. 22,231, *cited in Melville*, 309 F. Supp. at 777. Clearly, Congress' intent in enacting Section 924(c) was to penalize the use of firearms to carry-out illegal conduct, not to penalize the underlying illegal conduct itself.

Thus, the constitutionality of applying Section 924(c) to petitioners and to *amicus* depends *not* on whether Congress has the authority to penalize possession of contraband, but solely on whether Congress has the

authority under the Commerce Clause to penalize the use of firearms that occurred here.

Amicus does not argue that Section 924(c) is facially unconstitutional. *Amicus* contends merely that, in certain circumstances -- as here -- application of the statute would be unconstitutional were this Court to adopt the circuit court's interpretation of the statute. *Cf. Ada v. Guam Society of Obstetricians and Gynecologists*, ___ U.S. ___, 113 S. Ct. 633 (1992) (Scalia, J., dissenting from denial of certiorari: "[t]he practical effect of holding a statute unconstitutional 'as applied' is to prevent its future application in a similar context, but not to render it utterly inoperative").

Nor does *amicus* argue that Congress acts outside its enumerated authority by penalizing firearm use that substantially affects interstate commerce in drugs. But where no such substantial effect is caused by the conduct in issue in a particular case, regulation of that conduct is outside federal authority. *See United States v. Lopez*, 514 U.S. ___, ___, 115 S. Ct. 1624, 1630 (1995) ("the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce"). Thus, Congress' authority to penalize the use of firearms that occurred here depends on whether that use substantially affected commerce.

Neither petitioners nor *amicus* were proven to have used any firearm in any sense that substantially affected interstate commerce in contraband. Had Section 924(c) been intended to apply to petitioners' and *amicus'* use of firearms, it would have been unconstitutionally applied. Accordingly, this Court should follow its traditional rule and assume that

Congress meant to enact a statute wholly within the federal government's constitutional authority, and construe Section 924(c) as not applying to the firearm uses in issue here. *See, e.g., Public Citizen v. Department of Justice*, 491 U.S. 440, 465-66 (1989) (construing the term "utilized" not to apply to President's use of ABA Standing Committee on the Federal Judiciary, in order to avoid separation-of-powers concerns).

No court has yet been presented with a Commerce Clause challenge to application of Section 924(c) on facts such as are presented here. In those few cases where Section 924(c) has been questioned as exceeding federal authority under the Commerce Clause, the defendants had all been charged and convicted of appropriate predicate offenses, and Section 924(c) was properly applied to firearms use or carrying that by itself substantially affected interstate commerce. *See, e.g., Melville*, 309 F. Supp. at 778 (use of bombs to destroy federal military facilities); *United States v. Dumas*, 934 F.2d 1387, 1390 (6th Cir.) (carrying firearm while distributing crack), *cert. denied*, 502 U.S. 925 (1991); *United States v. Owens*, 996 F.2d 59, 61 (5th Cir. 1993) (guilty plea to firearms use during drug possession conspiracy); *United States v. McMillian*, 535 F.2d 1035, 1037 n.1 (8th Cir. 1976) (pistol-whipping during bank robbery), *cert. denied*, 434 U.S. 1074 (1978). *Cf. United States v. Thornton*, 901 F.2d 738, 741 (9th Cir. 1990) (upholding enhanced penalty for conviction for drug distribution, where distribution occurred near elementary school, because it regulates commerce in drugs by school children); *United States v. McDougherty*, 920 F.2d 569,

572 (9th Cir. 1990) (same; "[t]here is no legal reason why Congress cannot choose to punish some behavior [drug distribution near school] *affecting commerce* more harshly than other behavior" (emphasis added)), *cert. denied*, 499 U.S. 911 (1991).

Furthermore, even if application of Section 924(c) in the instant cases were constitutional, it would nevertheless impermissibly intrude into the traditional realm of state penal regulation. This Court announced in *Bass*, 404 U.S. at 349, that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." Congress, the Court reasoned, has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the states. Congress followed this rule when it first enacted Section 924(c), and has continued to respect the traditional realm of state primacy regarding the general criminal law. *See generally Melville, supra.*

Section 924(c), as applied to petitioners and *amicus*, destroys the federal-state balance. Currently, at least 32 states and the District of Columbia have criminal statutes substantially similar to Section 924(c)(1). *See* Ala. Code §§ 13A-5-6, 13A-11-56 (1975); Alaska Stat. § 12.55.125 (1994); Ark. Code Ann. § 5-73-211 (Michie 1987); Cal. Penal Code §§ 189, 12021.5, 12022.3, 12022.5 (West 1994); Conn. Gen. Stat. Ann. §§ 53-202, 53-202k (1994); D.C. Code §§ 22-3201(g), 22-3204(b), 33-541(a); Fla. Stat. ch. 775.087 (1992); Haw. Rev. Stat. §§ 134-6, 706-659, 660-660.1 (1988); Idaho Code § 19-2520 (1994); Ill. Comp. Stat. ch. 730, § 5/5-8-2 (Smith-Hurd 1992); Kan. Stat. Ann. § 21-4618 (1976); La.

Rev. Stat. Ann. § 14:94 (1986); La. Code Crim. Proc. Ann. art. 893.3 (West 1991); Me. Rev. Stat. Ann. tit. 17-A, § 1252 (West 1983); Md. Code Ann. Crim. Law Art. 27, §§ 36H-6, 281A (1957); Mass. Gen. Laws Ann. ch. 265, § 18B (West 1990); Mich. Comp. Laws § 750.227b (1991); Minn. Stat. § 609.11 (1987); Mont. Code Ann. §§ 45-8-303, 45-8-304, 46-18-221 (1978); Neb. Rev. Stat. §§ 28-416, 28-1205 (1943); Nev. Rev. Stat. § 193.165 (1973); N.H. Rev. Stat. Ann. § 651:2 (1971); N.J. Stat. Ann. § 2C:44-3 (West 1982); N.M. Stat. Ann. § 31-18-16 (Michie 1978); N.Y. Penal Law §§ 265.08, 265.09 (McKinney 1989); N.C. Gen. Stat. § 14-2.2 (1979); N.D. Cent. Code § 12.1-32-09 (1959); Or. Rev. Stat. §§ 161.610, 475.996 (1993); 18 Pa. Cons. Stat. § 4416 (1939); R.I. Gen. Laws § 11-47-3.1 (1956); S.C. Code Ann. § 16-23-490 (Law. Co-op. 1976); Utah Code Ann. § 76-3-203 (1953); Va. Code Ann. § 18.2-53.1 (Michie 1950); Wyo. Stat. § 6-8-101 (1977).

These statutes impose either a mandatory minimum or an extended sentence against criminals who use or carry a firearm while possessing drugs with intent to distribute. For example, in North Carolina, "if a person is convicted of a . . . felony and the person used, displayed, or threatened to use or display a firearm during the commission of the felony, the person shall, in addition to the punishment for the underlying felony, be sentenced to a minimum term of imprisonment for 60 months." N.C. Gen. Stat. § 14-2.2. Likewise, a person convicted in Connecticut for a class A, B or C felony and while committing such felony "uses, or is armed with and threatens the use of . . . any firearm, . . . shall be imprisoned for a term of five years, which shall not be suspended or

reduced and shall be in addition and consecutive to any term of imprisonment imposed for conviction of such felony." Conn. Gen. Stat. Ann. § 53-202k.

Indeed, the District of Columbia Law Enforcement Amendment Act of 1989, D.C. Law 8-120 § 3, 37 DRC 24, 25-26 protects the people of the District every bit as much as Section 924(c), if not more so. *See* D.C. Code §§ 22-3204(b) (imposing mandatory five to fifteen year sentence for firearm possession during "dangerous crime") and 22-3201(g) ("dangerous crime" defined as including possession with intent to distribute contraband).

The question thus is not whether the firearm conduct proven here may be punished. The issue is who has authority to mete out the punishment. Nothing stops the states from penalizing this conduct, and most states have already done so. What stops the federal government is the Constitution and due respect for the traditional primacy of the states in enforcing the general police power to protect the people.

This Court has recently reaffirmed its respect for our American system of divided government by enforcing the constitution's separation of state authority from federal authority. *See, e.g., Lopez*, 115 S. Ct. at 1631 (firearm possession ban unconstitutionally exceeded Commerce Clause power and violated the Tenth Amendment where there was no statutory requirement that the possession substantially affect interstate commerce); *U.S. Term Limits, Inc. v. Thornton*, ___ U.S. ___, ___, 115 S. Ct. 1842, 1872, 1873 (1995) (Kennedy, J., concurring: "[t]he Framers split the atom of

sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. . . . [T]he federal Government must be held within the boundaries of its own power when it intrudes upon matters reserved to the States. *See United States v. Lopez* [citation omitted]."). The present cases once again invoke this Court's duty to police the boundary between the state and federal realms.

There is nothing inherently "federal" about a firearm. The government's theory of "use" as "emboldening" proves too much, because there is no area of traditional state regulation that cannot be reached by such a theory. The theory would permit, for example, enhanced federal penalties if the drugs were stored in a house with a lock on the front door, because the lock "emboldened" the defendant to keep drugs inside; would permit enhanced federal penalties if there were a trash can nearby, because the defendant might have thought about using the trash can as a hiding place for the drugs; would permit enhanced federal penalties if the defendant owned a car, because the drug dealer would "use" the car by thinking about the possibility that he could drive it to buy or sell drugs or to escape robbers or the police; and would permit enhanced federal penalties for owning clothes, because the defendant would not go out on the streets naked and thus the clothes "embolden" the defendant to go out in public to engage in commerce. The fact that these examples may sound absurd does not rebut the point that under the government's theory, all of them would be matters of federal concern punishable by federal penalties. The problem with

the government's "emboldening" theory is the same as that identified in *Lopez:* under the government's theory, "it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States have historically been sovereign." 115 S. Ct. at 1632.

B. The Government May Not Convict These Defendants by Pointing to Acts That These Defendants Did Not Commit

Amicus began his argument herein by recognizing that firearm violence in drug trafficking is a serious national problem well within the jurisdiction of Congress to address. But neither *amicus* nor petitioners committed any act of firearm *violence*. Petitioners and *amicus* cannot be convicted for acts they did not commit.

Examination of this Court's *Lopez* decision makes this abundantly clear. The dissenting Justices relied heavily on evidence of actual firearm violence in the schools to justify their position that the Gun-Free School Zones Act constitutionally regulated interstate commerce -- evidence which the majority and concurrences properly disregarded, because it was not *that* conduct for which the government penalized Lopez. Lopez was arrested for carrying a hidden gun near a school -- not for brandishing it in class. Even accepting all the dissent's arguments regarding the substantial effect of schooling on interstate commerce, the fact remained that Lopez' *act* -- carrying a hidden gun near the school -- of itself had *no* effect on the school's operations. *See Lopez*,

115 S. Ct. at 1634 ("[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce"), 1650 (Thomas, J., concurring, but criticizing the Court's "repetition elsewhere" principle of aggregation because it "has no stopping point.").

The same is true here. Petitioners and *amicus* simply have not committed any of the acts Congress sought to penalize in Section 924(c). Their convictions must be reversed.

CONCLUSION

For the reasons stated, *amicus* respectfully submits that petitioners' convictions under Section 924(c) should be reversed.

Respectfully Submitted,

EDWARD H. SISSON
Counsel of Record
DANIEL A. REZNECK
Arnold & Porter
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5495

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